

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 279.

FEDERAL TRADE COMMISSION,

Petitioner,

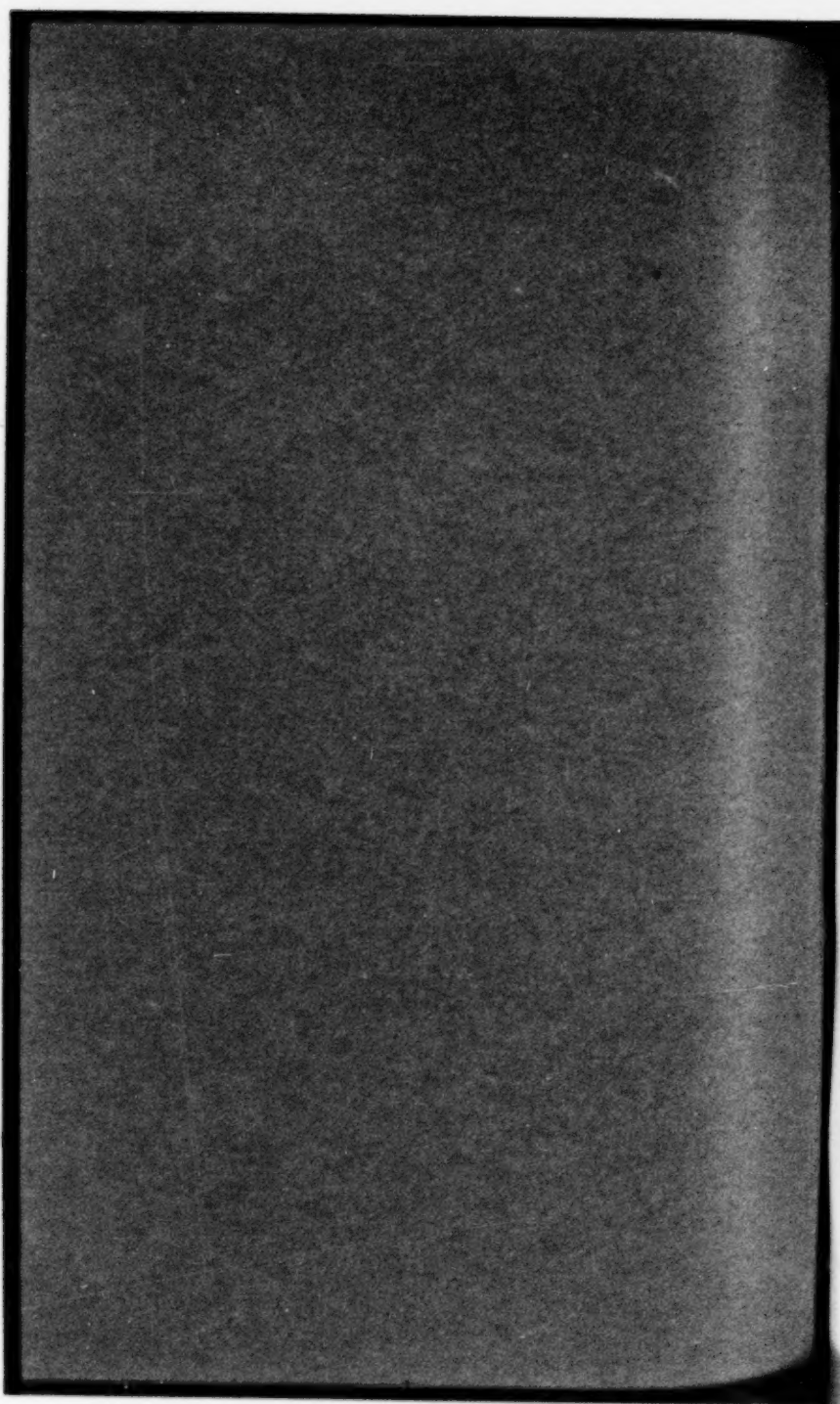
against

THE AMERICAN TOBACCO COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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Statement.

This proceeding was begun by the Commission on May 29, 1922, under Section 5 of the Federal Trade Commission Act. The parties made respondents in the Complaint were Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, its officers, directors and certain dealers, members of the Association, this group being referred to in the Complaint as "The Members"; The American Tobacco Company and P. Lorillard Company, who are designated in the Complaint as "Respondent Manufacturers". The purpose of the proceedings was to restrain alleged unfair methods of competition consisting of price maintenance resulting from a conspiracy asserted to exist among the Association, its officers, directors and members. The Complaint alleges that

"Respondent Manufacturers cooperated and conspired with the Association and its members and participated in said price maintenance system."
(Rec., 5, fol. 13.)

On February 16, 1924, a Cease and Desist Order was entered against The American Tobacco Company, as follows:

"That the American Tobacco Company cease and desist from assisting and from agreeing to assist any of its dealer customers in maintaining and enforcing in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer customer by agreement, understanding or combination with any other dealer customer of said The American Tobacco Company." (Rec., 725, fol. 1361.)

A Cease and Desist Order was also entered on the same date against the Association and its members. The Complaint against P. Lorillard Company was dismissed.

The Wholesale Tobacco & Cigar Dealers' Association of Philadelphia ceased to function in February, 1922, and was formally dissolved June 9, 1922. (Rec., 717, fol. 1344, Rec., 727, and following fols. 1366, 1368, 1370, et seq.)

Neither the Association nor any of its members made application for a review of the Order against them. The Association had been out of existence for two years when the order to cease and desist was made. We are not concerned, therefore, with that part of the Order addressed to the Association and its members, but only with the Order against The American Tobacco Company.

This order was entered over the vigorous dissent of Commissioner VANFLEET, who said (Rec., 780):

"Without summarizing the evidence to my mind it appears that the truth is that The American Company had nothing to do with the organization of nor conduct of the association and I know of no proof to the contrary. Also I believe its acts were taken independently of the association and no real proof to the contrary appears.

The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company." (Rec., 726, fol. 1363.)

On The American Tobacco Company's petition, the Order was set aside by the Circuit Court of Appeals of the Second Circuit (9 Fed. Rep. 2d S. 570). Judge ROGERS, among other things, saying (Rec., 804):

"It must suffice now to say that we are entirely in accord with the conclusion at which he (Commissioner VANFLEET) arrived, and we are of opinion that there is no proof which warrants the order which the Commission entered."

Judge LEARNED HAND concurred in the result on the ground that, by the dissolution of the Association before the Complaint was heard by the Commission, the controversy had become moot. (Rec., 804).

Accepting the Commission's own version of the consequences of the conspiracy which it has so circumstantially charged and which it asserts it has proceeded against in the public interest; it appears that one jobber, Murphy Brothers, whose credit was stretched nearly to the breaking point, had a shipment of The American Tobacco Company's goods delayed for credit reasons for one month from August 29, 1921, to October 4, 1921. Another Jobber, Charles Seider, was off the direct list of The American Tobacco Company for a few months, April 20, 1921, to August 13, 1921. Two other jobbers, Blumenthal and Fermani, in 1921 were delayed on one occasion in getting their shipments. These were the only results of the alleged conspiracy. No one was even inconvenienced and the price to the consumer was not affected in the least.

The Commission's Findings.

The Commission's findings may be summarized as follows:

That the Philadelphia Jobbers Association undertook among themselves to maintain prices and sought and secured the cooperation of The American Tobacco Company, with respect to its brands, to that end; the Association reported to the Company the names of dealers who failed to maintain prices. The Company, upon receiving this information, proceeded to investigate the facts and if it found that the dealer reported was cutting prices on its goods, it refused to furnish more of them to him (Rec., 721).

The Commission reached its conclusion of illegality upon a specific finding that the Tobacco Company, after investigating a complaint made to it by the Association, discontinued selling to Charles Seider from April 20, 1921 to August 13, 1921 (Rec., 722, fol. 1355); that, after investigating complaints of price-cutting made by the Association against Murphy Brothers, it discontinued selling to them in the period from August 29, 1921 to October 4, 1921 (Rec., 722, 723, fols. 1355-56), that shipments were withheld from Fermani and Blumenthal in 1921 because of complaints made by the Association that these dealers were cutting prices on The American Tobacco Company's brands (Rec., 723, fol. 1356) while it was investigating the facts so reported.

There was no allegation that The American Tobacco Company and P. Lorillard Company, the two manufacturers made respondents in the complaint, entered into any agreement with each other to fix the prices charged by them for their respective manufactured products and no allegation that they entered into any agreement, express or implied, or took any cooperative action whatever with respect to anything.

Theory of Commission and Conduct of Respondents.

The theory of the complaint seems to be that the Wholesale Association of Philadelphia (which included wholesale dealers living in and doing business in Camden, N. J.) entered into an unlawful agreement and that they used the manufacturer, The American Tobacco Company, as an instrument to coerce wholesale dealers or jobbers, members of the association, who did not keep their agreements, and non-members who sold goods at a price below that fixed by the association.

The American Tobacco Company answers that it kept aloof from the association and that in the two instances in which it discontinued for an appreciable time the shipments of orders of customers it acted for its own protection, for credit reasons or because its means of distribution were becoming threatened, or for both reasons, and not because it was influenced by the importunities of the association or its officers or members.

The association was charged with having agreed upon a price and they were found to have agreed upon a price; but no effort was made to show that there was any profiteering or that the price was unduly high or procured for jobbers more than a legitimate profit for the service rendered.

The American Tobacco Company, following an almost universal trade custom, issues a price list. Its prices at the time were the list prices less 10% off as a trade discount and 2% as a cash discount—"10 and 2". The evidence is that no attempt was ever made by the members of the Philadelphia Association, to obtain a profit in excess of 5% and this 5% is inclusive and not exclusive of the 2% cash discount. That is, they sold at 8 and 2—later at 7 and 2—"off the list." There is no proof and no attempt to prove that any one was injured in any way by the alleged activity of the Philadelphia jobbers.

There is no evidence to show and no attempt was made to show, and it is not true, that retail prices were increased by any activity of the Philadelphia Wholesale Association or its members. There is no evidence to show and no attempt was made to show that any retailer ever complained of injury or ever was injured by any activity of the Philadelphia Association. Indeed there is no effort made to show that the jobbers, whose shipments were temporarily held up by The American Tobacco Company, were themselves in any way injured. Seider, a cigar manufacturer, was obviously using The American Tobacco Company's produces for "bait" to sell his own goods. James Murphy did not know that his orders had been held up until the Commission's counsel told him so when he was testifying.

The Problem of Tobacco Merchandising.

For a clear understanding of this case a brief mention of certain business facts is necessary. The consumer as a rule—which is almost a universal rule—buys his requirements from day to day. Consumers in the United States are served by three-quarters of a million stores. The manufacturer must see to it that all of these stores are supplied with his products all the time, because, if a consumer cannot get his favorite brand of tobacco or cigarettes where he usually trades, he will probably buy another brand and become accustomed to using it and so a patron of the company whose brands are not well distributed will be lost.

This problem of supply cannot be solved, however, by inducing the retailer to carry a large stock because tobacco products keep fresh for only a limited time.

The jobber therefore performs a very useful function. First the aggregate of jobbers must serve all the retail dealers, and second their service must be so uni-

form and frequent that each retail dealer is always supplied with fresh goods as far as possible. The problem is a difficult one for the manufacturer.

We need not burden this court with a discussion of how and why price wars arise among jobbers. It will be clear, however, we think, that when they do arise the jobber or jobbers who undersell others tend to drive their competitors into other lines of business and the result is—starting from a point where the jobbers in a community are adequate in number to serve the retail trade—that a price war among jobbers demoralizes or disorganizes the orderly machinery of distribution.

The goodwill of a brand of cigarettes or other tobacco product has cost in advertising or otherwise, and is worth, many millions of dollars and the preservation of that value depends upon the maintenance of the proper machinery of distribution. Hence the manufacturer is very much concerned when many jobbers become dissatisfied with the wholesale tobacco business by reason of excessive competition.

The functions of a jobber are (a) to carry a stock of goods, (b) to fill the orders of the retail dealer, (c) to solicit orders through traveling salesmen and (d) to extend credit to the retail dealer.

The business of distribution could not be effectively carried out without substantial and well equipped business houses in every community performing all the wholesale dealers functions. It is undoubtedly true that the well equipped and conservative wholesale house, which performs all the jobbing functions, is more valuable as a customer but cannot sell at as small a margin of profit as one who performs only a part of the necessary functions—the part which he can perform at least expense.

For example, one of the functions of a jobber is to take drop shipment orders sent to him by the retailer,

voluntarily or at the instance of a salesman employed by the manufacturer. The drop shipment order is an order given by the retailer for the shipment to him of goods direct from the manufacturer, on which the manufacturer pays the freight or express. The manufacturer sends the bill to the jobber who has taken or accepted the order and the jobber in turn charges the retailer. In this transaction the only function of the jobber is to be responsible for the credit. The manufacturer can not be frowned upon from the standpoint either of law, or business, if he looks with disfavor upon a customer who performs effectively only one, and that the easiest and most profitable of the jobber's functions, such as taking drop shipment orders. Perhaps the most undesirable customer is the one who uses trade marked articles for "bait"—selling the trade marked articles at a loss which is recouped by the sale of articles of the dealer's own manufacture, or standard articles not carrying a brand name or trade mark. This was one incident of the Philadelphia situation.

The matter of credit is closely bound up with the matter of price. If a jobber initiates or otherwise engages in a price war, it is obvious that the tendency is for him to buy and resell more goods the more he lowers his price. In other words, as he lessens his profits he increases his debit account with the manufacturer. This was another incident of the situation in Philadelphia.

Of course the manufacturer does not desire that the jobber shall sell at an exorbitant price. On the contrary the manufacturer's interest lies in the jobber selling at the lowest price that will maintain a profit sufficient to induce enough jobbers to remain in business in any given community to supply adequately the retail trade. This is obvious because, other things being equal, the less money goods cost the consumer the greater will be the volume of sales.

However, on account of the delicately balanced machinery of distribution and the need for the constant flow of products to the retailer, the manufacturer feels that his business is jeopardized when jobbers complain of lack of profits due to excessively low prices induced by over-competition.

Summary of Argument.

The American Tobacco Company contends that: The findings of the Commission on which the order is based are not supported by any evidence.

(a) There is no proof that respondent employed unfair methods of competition. At most it delayed shipments of its goods to four of its customers, of its own accord and for valid business reasons. "Unfair methods of competition" implies a system, a plan or method, not a number of casual occurrences.

(b) There is no proof that respondent entered into any agreement, combination or contract, written or oral, express or implied, with the Philadelphia Wholesale Tobacco Dealers Association or its members, or any of them or with anybody. On the contrary, there is positive proof that it did not.

The proof is that respondent acted lawfully for its own protection and there is no proof that it conspired or "cooperated" with the Association for unlawful ends or in aid of unfair methods of competition.

The only disputed question in this case is whether anything has been proved against the respondent. The Federal Trade Commission has shown certain acts of The American Tobacco Company, from which it seeks to draw inferences of sinister purpose. We have shown the lawful and proper purpose of each of the acts in question. We assert there is no evidence to support the conclusions of the commission.

The whole controversy, then, is one concerning evidence—not of the weight of the evidence but whether there is any evidence at all which proves the allegations of the Complaint. One Commissioner, (VanFleet), held that there was none, saying:

“* * * to my mind it appears that the truth is that The American Company had nothing to do with the organization of nor conduct of the Association, and I know of no proof to the contrary.” (Rec., 726, fol. 1363).

The Commission dismissed the Complaint against P. Lorillard Company, although that Company was charged along with The American Tobacco Company with the same alleged unlawful acts under the same circumstances, and thus it seems to us the Commission itself has held that as the same acts when committed by P. Lorillard Company do not amount to unfair methods of competition, equally they do not when done by The American Tobacco Company. In this connection, Commissioner VANFLEET remarked:

“The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company.” (Rec., 726, fol. 1363).

The Circuit Court of Appeals set aside the Commission's Order because there was no evidence to support it. Thus, on this question of fact, one member of the Commission and the Circuit Court of Appeals are in entire accord. The Commission now asks this court to review this question of fact, and to hold that there is evidence to justify an Order requiring The American Tobacco Company to “cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the re-sale of cigarettes

and other tobacco products manufactured by the said The American Tobacco Company, re-sale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company." (Rec., 725, fol. 1361).

We believe that this Court is disinclined to reverse decisions of lower tribunals on questions of fact, including the question whether there is any evidence to support a given finding, but should the Court feel that the testimony in this case requires further study by it, we have prepared a schedule which is printed as a schedule to this Brief (post, p. 29) containing a discussion of each of the Commission's findings, with quotations from the testimony showing in what respect we think they are without support in the record.

II.

Argument.

What is an unfair method of competition is a question of fact.

The Commission, in entering its order against The American Tobacco Company, proceeded under Section 5 of the Federal Trade Commission Act which gives authority to issue a cease and desist order against "unfair methods of competition".

What is an unfair method of competition? It cannot be merely an act; method implies continuity. A method is a way, not an incident. There must be, we think, some sort of systematic unfairness to amount to unfair methods, (Mr. Justice Brandeis in his dissent in *Federal Trade Commission v. Gratz*, 253 U. S. 421, intimated that this was his view). Method is procedure according to definite principles, not a number of casual

occurrences. We speak of one who intentionally does things repeatedly in the same way as a methodical person, an orderly grouping of material as a methodical arrangement. We distinguish the modern method of teaching law by cases from the lecture system. The name Methodists originally was given in derision to those Oxford students who met with the Wesleys, because they followed a fixed system of study and conduct. So it seems to us that when in Section 5 of the Federal Trade Commission Act, Congress forbade unfair methods of competition in commerce it must have meant a systematic course of conduct characterized by deception, bad faith, fraud or oppression (*Federal Trade Commission v. Gratz*, 253 U. S. 421, not such a situation as this record shows, four instances of delayed shipments to customers for valid business reasons.

In order to appreciate the soundness of the conclusion of the Court below that the Respondent was not guilty of unfair methods of competition, it is necessary to understand the facts with respect to the sale of tobacco products and the particular evils which had grown up in the business at the time to which this proceeding relates. These we have already discussed. As this Court has said on many occasions, unfair competition is a question of fact and is to be determined with reference to the particular conditions which exist in the industry.

In the language of Mr. Justice Pitney in *International News Service v. Associated Press*, 248 U. S. 215, at page 236:

"Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business."

In *Chicago Board of Trade v. United States*, 246 U. S. 231, Mr. Justice BRANDEIS said (238):

"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agree-

ment concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule, and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business, consistent with the provisions of the Anti-Trust Law."

When viewed in the light of the facts as they existed during the time to which this proceeding relates. We think that what respondent is shown to have done was merely what a sensible man would do and might lawfully do for the protection of his own business and that the law as announced by this court in *U. S. v. Colgate & Co.*, 250 U. S. 300, *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441 and *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U. S. 565 has not been departed from. These cases as we interpret them, define the following as the rights, pertinent to this case which an individual manufacturer may exercise:

(1) He may name, suggest and recommend prices at which he wishes his goods resold. He

may state the reasonableness of such prices and the benefit to be derived from their observance;

(2) He may announce his intention to refuse sales to those who sell his goods at prices which differ from the resale prices which he suggests.

(3) He may refuse sales to those who do not observe such prices.

The Circuit Courts of Appeal seem in recent cases to have sustained the right, which the respondent here claims, to choose its customers and to refuse to trade with dealers whose conduct, with respect to respondent's goods, in its opinion, has a tendency to obstruct their distribution.

In *Cream of Wheat Co. vs. Federal Trade Commission*, 14 Fed. (2d) 40, 50, the Circuit Court of Appeals of the Eighth Circuit, decided that the sales policy of the Cream of Wheat Company was lawful and not an unfair method of competition. This policy embraced requesting customers not to sell Cream of Wheat at less than a stated minimum price; refusing to sell when this request is disregarded; announcing in advance an intention thus to refuse; and informing itself through agents, advertisements and other legitimate means as to the prices at which Cream of Wheat is being sold.

In *Harriet Hubbard Ayer v. Federal Trade Commission*, 15 Fed. (2d) 274, Certiorari denied March 15, 1927, the Circuit Court of Appeals of the Second Circuit held that a manufacturer may prescribe conditions under which he will deal with jobbers and retailers, and occasional instances of refusal to sell to a price cutting dealer was not an unlawful method of competition.

"He should be permitted," said the court, "to exercise the privilege which the law accords him of selecting his customers, and refusing to sell to customers who undermine the market by becoming price cutters. He should not be hampered in conducting his legitimate business. Section 5 of the

act does not give the Federal Trade Commission power to thus regulate trade policy."

It seems clear, therefore, that respondent had the right to refuse to sell any dealer for any reason or no reason, just as any dealer had the right to refuse to buy of respondent for any reason or for no reason. And since no reason is needed for the refusal, the validity of the one assigned is immaterial, but if respondent believed, as it did from its past experience, that its business might be demoralized, the distribution of its goods obstructed by the action of some dealers in unreasonably cutting prices on them, and that the value of its trade marks might be seriously impaired, it had a right to say so at the time, or before, it refused to sell price cutters.

We do not believe that there will be any dissent from the foregoing statement of what the law is. Neither do we think that there will be dissent from the statement that if a manufacturer, who does not desire to adopt the drastic method permitted him by *United States vs. Colgate* (supra) but prefers to indicate to dealers that he will refuse to sell them if they adopt so low a reselling price as to do injury to his business, he may attempt to inform himself, by conference with jobbers or otherwise, as to a minimum resale price, sales below which will inevitably injure his business. This is an important proposition of law as applied to the tobacco trade, because conditions vary in different parts of the country. We believe, moreover, that it is the law that the manufacturer may confer not only with one jobber or separate jobbers, but that he may confer with several jobbers in the territory affected, and that he may invite conferences among jobbers themselves to get their opinion as to what is, in the circumstances, the minimum price below which, under the conditions prevailing in that particular community, certain injury to his brands and business lies.

It is this last proposition, if any, that will be disputed. Some people seem to assume that the rules of law which are intended to preserve competition between ostensible competitors must also preserve hostility between them, or absolute isolation.

It is undeniably true that agreements to eliminate competition need not be express agreements, and it is equally true that the existence of agreements—express or implied—may be evidenced by conduct or other circumstantial proof. It is not true, however, that the mere existence of a customary price is sufficient to prove the existence of an agreement (*Frey v. Cudahy*, 256 U. S. 208).

With respect to many articles, visits to a hundred retailers in the City of New York would show absolute uniformity of price, but there does not exist the shadow of an agreement between these hundred retail dealers. We feel sure that if jobbers in a given community, in an association or out of it, confer and unite in the forming and in the expression of opinion to a manufacturer that sales of his product below a given minimum price will work injury to his brands and business in that community (assuming that the jobbers are left free to conduct their own business as they see fit)—there is no violation of law, and no violation of law on the part of the manufacturer who invites it. (This though is not what we did; but rather what we were charged with doing.)

The legitimacy of conferences among competitors, has been recognized by the courts. In *Maple Flooring Manufacturers' Association v. United States*, 268 U. S. 563, Mr. Justice STONE said (582):

"It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity

of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful."

The lawfulness of exchanging information and conferences among competitors is recognized by Judge BUFFINGTON in *United States v. United States Steel Corporation*, 223 Fed. 55, 154. A succinct statement of what we conceive to be the law is made by Judge MORTON in *United States v. Piowaty*, 251 Fed. 375, 377:

"In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization and after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided, and beyond its proper meaning, and would cause the greatest confusion and uncertainty."

It seems to us apparent that the Federal Trade Commission thought when it filed this complaint that The American Tobacco Company had been guilty of conduct condemned in the *Schrader* case, 252 U. S. 85, or in the *Beechnut* case, 257 U. S. 441. From this record, and from the findings of the Commission itself, it is obvious that there has been no such conduct.

The Commission has not even proved the necessary facts.

It may be well again to mention that the Federal Trade Commission does not charge and does not attempt to prove that any harm was done to any individual, firm, or corporation by the alleged practices of which it complains but only that they came within the category of unfair methods of competition as the Commission interprets this phrase.

(a) The Sherman Law is not involved.

The Federal Trade Commission may have assumed that a technical violation of the Sherman Law is *ipso facto* an unfair method of competition but of course that is not so. The Federal Trade Commission Act gives the Commission jurisdiction to issue a cease and desist order against "unfair methods of competition" (Sec. 5) only when it "shall have reason to believe that any . . . person, partnership or corporation has been or is using any unfair method of competition in commerce and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, etc." (Sec. 5).

The same acts may violate the Sherman Law and constitute an unfair method of competition, but we believe it to be self-evident that there may be a violation of the Sherman Law—for example, a monopoly arrived at by a combination by purchase of all competitors—which might be satisfactory and beneficial to all of them, and which would therefore not be an unfair method of competition.

We submit that the jurisdiction of the Federal Trade Commission is dependent upon the existence of a state of facts which connotes unfair methods, and when those facts are proved, it is unimportant whether they do or do

not also amount to a violation of the Sherman Law or any other law; and if those facts do not constitute or connote unfair methods of competition, the fact that they violate the Sherman Law is immaterial. "Unfair methods of competition" is not the equivalent of restraint of trade. A showing that the Sherman Law is violated is not conclusive one way or the other. To prove that there was a technical and trifling, as distinguished from a harm-working, violation of the Sherman Law is therefore, we believe, not sufficient to constitute proof of unfair methods of competition within the meaning of the Federal Trade Commission Act.

Indeed, this was well stated in *Federal Trade Commission vs. Beechnut Packing Co.* (supra) where it was said in the prevailing opinion (p. 453):

"The Sherman Act is not involved here except in so far as it shows a declaration of public policy, to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."

Mr. Justice HOLMES, in his dissenting opinion in that case, said (p. 456, 457):

"The ground on which the respondent is held guilty is that its conduct has a dangerous tendency unduly to hinder competition or to create monopoly. It is enough to say that this I cannot understand. So far as the Sherman Act is concerned, I had supposed that its policy was aimed against attempts to creat a monopoly in the doers of the condemned act or to hinder competition with them."

(b) The Sherman Law was not violated by respondent.

To discontinue two, three, or four accounts temporarily for reasons of our own, is not a violation of the Sherman Law and the fact, if it is a fact, that the Whole-

sale Association may have desired that we take that action is immaterial even if the Association was violating the Sherman Law. A violation of the Sherman Law by Philadelphia jobbers in the organization and operation of a conspiracy in restraint of trade (assuming such violation only for the purposes of the argument) does not make the Association so infectious as to taint everyone coming into contact with its members. Otherwise, anyone having any relation with an unlawful association, who, independently, may happen to conduct himself in a way which coincides with the purposes of the conspirators, becomes a party to the crime, even if, as here, there was no duress and no agreement but only action taken in furtherance of the respondent's own interest and for its own benefit.

There must, we think, be an agreement of some sort before anyone becomes a conspirator, and no agreement is shown in this case between The American Tobacco Company and the Wholesale Association. Whether the Association was violating the Sherman Law or not under our view above set forth, we cannot believe that a violation of the Sherman Law by the Jobbers' Association constituted an unfair method of competition on the part of The American Tobacco Company.

(c) This case is not governed by the Beechnut Case.

In *Federal Trade Commission vs. Beechnut Packing Company* (*supra*) the outstanding fact is that the Beechnut Packing Company had a system or policy—a method—which it itself instituted. There was no denial of this. It was referred to in the opinion as the "Beechnut policy" and the "Beechnut system of merchandising." The complaint charged that the Beechnut Packing Company "in order to accomplish the illegal purposes intended" required purchasers of its goods to do certain things.

That is neither the fact nor is it the theory of the Commission in the present case. The essence of the

charge against The American Tobacco Company is that an Association of jobbers in Philadelphia "sought and secured" its cooperation—that they drew it into a conspiracy that they initiated.

The Federal Trade Commission was not concerned with proving anything in the Beechnut Case because that case was submitted upon an agreed statement of facts. Here, on the contrary, the Commission, like any other complainant, has the burden of proof, and it is bound to prove an unfair method of competition by respondent.

It is evident that respondent had no systematic policy. There was no method of competition fair or unfair. At most two or four sporadic attempts were made to prevent the disorganization of our facilities for the distribution of our goods, and these attempts were influenced as much by an anxiety to curtail over-extended credit as to protect and preserve proper distribution. Indeed the Federal Trade Commission entirely ignores the business necessity of protection against over-extended credit, and makes the gratuitous assumption that temporary discontinuance of the two over-extended accounts was due to an attempt at coercion solely for price fixing reasons, and not only so but that it was done at the behest of and after agreement with the Philadelphia Wholesalers Association and to further its interests only.

While we believe that the law is definite, we believe that we should state our understanding of it as applicable to certain things which we admit having done and point out the authority on which we relied to sustain the propriety of our action. We are not aware of any opinion of this court in which it was ever held that anything less than a contract express or implied was sufficient to sustain a finding of unlawful conspiracy to fix prices.

When the activities complained of are alleged to have taken place, *Frey & Sons, Inc. vs. Cudahy Packing Company* (*supra*) had been decided and *Federal Trade Commission vs. Beechnut Packing Company* (*supra*) was

pending undecided in this court. It may perhaps be assumed that The American Tobacco Company proceeded with some regard for the law as then declared, and it was settled at that time that no contract, express or implied, for the maintenance of resale prices was permissible under the Sherman Law (we are not now arguing whether the Sherman Law is applicable to this situation). We believe that a plain statement of the law is set forth in *Frey & Sons vs. Cudahy Packing Company*, 256 U. S. 208, 210, which had been published before the alleged occurrences complained of. While that case involved some difficulty over matters of procedure, the law was plainly stated. The plaintiff, Frey & Sons, recovered a judgment for treble damages in the District Court, which was reversed in the Circuit Court of Appeals. Frey & Sons then came to this Court, having waived a new trial and consented to final judgment in favor of their opponents in the event they lost here. This Court held that if any errors were made by the District Court, then the judgment of reversal by the Circuit Court of Appeals would be confirmed although the Circuit Court of Appeals itself may have misinterpreted the law in that reversal. Mr. Justice McReynolds, in the prevailing opinion, set forth one part of the charge which was held to be error. This then gives us a negative statement of the law, or a statement of what the law is not, but for our purposes such a statement is precisely as useful as a statement of what the law is. It is equally clear whether the court holds it is lawful to do so and so, or it is not unlawful to do so and so. Now this is what the Judge in the District Court charged:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on

very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act." (256 U. S. 208, 210, 211.)

As to this charge, Mr. Justice McREYNOLDS said:

"The recited facts, standing alone (there were other pregnant ones), did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in United States vs. Colgate & Co. As given, the instruction was erroneous and material." (256 U. S. 208, 211.)

This we conceive to be a plain statement of the law.

The Colgate Case also had certain technical aspects; that is, this Court held that it must accept the District Court's interpretation of the indictment. Mr. Justice McREYNOLDS said (p. 306, 307):

*"Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment,—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act * * **
*We cannot, e. g., wholly disregard the statement that 'the retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do' and we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to sell except at prices fixed by the company * * * in the absence of any purpose to create or maintain a mo-*

nopoly the Act (Sherman Act) does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

We challenge the Commission to point out any fact which tends to prove that we were not within the law as laid down in these cases which had been decided before the time of the alleged acts complained of. Not only does this case differ from the Beechnut Case on the facts (a) In that we were not the promoters of any plan, (since we *declined to be used unlawfully for the ends of others in the promotion of their plan*); but (b) *we neither sought assurances nor entered into any understanding, tacit or otherwise*. We believe that the Beechnut Case is not difficult to reconcile with the Colgate Case but it seems that confusion has arisen in the minds of many lawyers, and indeed perhaps in the minds of some judges who may have assumed that because a conspiracy to fix prices may be proved by a course of conduct, that, ergo, a course of conduct that succeeds in stabilizing prices is unlawful. This is a *non sequitur*. An unlawful agreement may be proved by a course of conduct from which it is reasonably inferable, but the course of conduct must prove an unlawful agreement, express or implied, written, oral or tacit, in order to constitute conspiracy. The facts deduced from the course of conduct must prove what is, in contemplation of law, an agreement, because, as Mr. Justice Holmes said in *U. S. vs Kissel*, 218 U. S. 601, 608: "A conspiracy is a partnership in criminal purposes," and an agreement is indispensable.

In his opinion in the Beechnut Case, Mr. Justice DAY said: "The success or failure of the plan depended upon a tacit understanding with purchasers and prospective purchasers."

We realize that there is language in the prevailing opinion in the Beechnut Case which, standing alone, might, if the case is not thoughtfully considered, give rise to the idea that Mr. Justice DAY meant that working to achieve the same end without agreement express or implied might constitute a violation of the Sherman Law, but a careful reading of the prevailing opinion indicates clearly that Mr. Justice DAY was considering the case as one in which a contract existed by "tacit understanding", by "satisfactory assurances" and other incidents from which implied agreements were spelled out.

We conceive the law to be that the facts shown must support a finding that a system of agreements (implied or tacit perhaps, but still agreements, meetings of the mind, applicable to goods already sold, tying a contractual string to those goods) must exist for a violation of the law to exist. It is not the existence of a plan, or calling attention to it, or following it, that constitutes a violation; it is not a threat to cut off a customer who does not keep a price; it is not the act of cutting him off when he does not keep that price; it is not that a plan is unlawful simply because it works, unless it is unlawful *per se* to have a uniform price, which, we suppose, no one would assert. But the facts shown must prove a contract, and the rule that a contract may be proved by indirect evidence or implied from a course of dealing does not diminish the burden of proof. That circumstantial evidence is admissible does not relieve a party from adducing it in quantity and quality sufficient to prove his case.

It is not enough to show that the interest of several parties is served by the same condition. It cannot be assumed that such condition, if it is brought about, was brought about by unlawful agreement rather than by a lawful concatenation of circumstances. Simply because the protection against the threat of real and substantial and definitely concrete money loss may have led the re-

spondent into action in certain sporadic cases that served certain customers' interest, it does not follow that we entered into an unlawful conspiracy with them.

The question whether there was an agreement between The American Tobacco Company and the Philadelphia Jobbers' Association is entirely one of fact. Is the Commission's conclusion that there was an agreement supported by evidence? The Court below held that it was not. Commissioner Van Fleet says in his dissenting opinion (Rec., 781)

"when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity."

III.

Conclusion.

The question presented by this case is whether a manufacturer may assist his customers to make a living profit in the sale of his goods by receiving (without pre-arrangement and without invitation) reports from them of dealers who are selling his brands at ruinous prices and thus forcing all his customers to sell without profit, and if the truth of these reports upon investigation is established, whether the law requires him to sit still and stand mute when he sees a price war develop among his customers with his trade marked goods as the bone of contention the result of which is to obstruct their distribution and destroy his trade mark property, or, may he, in self-defense, take steps to disarm the persons who are making war on him by refusing to furnish them the weapons which they are using for his own destruction.

In short, may he exercise his right to select his customers by excluding those whose dealings in his goods

he believes to be detrimental to his interest by the destruction of his business good will? Good will is merely the reasonable expectation of future custom. Trade marks and brands are a means of realizing this expectation by furnishing to the consumer identifying marks so that preference may be exercised, otherwise no intentional future custom is possible. It is on this principle that the imitation of trade marks is restrained—the reasonable expectation of future custom is interfered with by fraud. But this expectation may be interfered with otherwise than by fraud. In this case, when, for example, Lucky Strike cigarettes are so dealt in by one wholesale dealer that others decline to handle them with the result that retailers, and hence the public, cannot get them, the manufacturer's reasonable expectation of future custom is destroyed because the public is denied the opportunity to buy his goods.

The manufacturer of tobacco, like the producer of gasoline, is "vitally interested in putting his brand within easy reach of consumers" (Mr. Justice McREYNOLDS in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 475). The refusal of the manufacturer to sell his identified merchandise to the person who interferes with this vital interest where, if the interference is continued, disaster may result, is no more than a necessary step to protect his trade-mark property against damage by misuse calculated to destroy it. A practice such as this, like the infringement of a trade mark, is an interference with the manufacturer's good will of which his trade mark is the symbol: one destroys it and the other diverts it. Considering the sensitive nature of the property in trade marks, to move thus in self-defense seems entirely reasonable. As Mr. Justice HOLMES remarked in *Bourjois v. Katzel*, 260 U. S. 464-466:

"It (a trade-mark) deals with a delicate matter that may be of great value, but that easily is de-

stroyed, and therefore should be protected with corresponding care,"

The Court below said (Rec., 803):

"The examination of the testimony convinces us that what The American Tobacco Company is shown to have done is so far removed from constituting an unfair method of trade that it actually tended to promote fairness of trade and the suppression of unfairness in competition."

We think the Court was right. As Mr. Justice McREYNOLDS remarked in *Federal Trade Commission v. Curtis Publishing Co.* (260 U. S. 568, 582):

"Effective competition requires that traders have large freedom of action when conducting their own affairs."

We ask, therefore, that the decree below be affirmed.

Respectfully submitted,

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The American Tobacco Company.

SCHEDULE.

Findings of the Commission and Facts as to the Conduct of The American Tobacco Company.

If we understand the law, an order to cease and desist issued by the Federal Trade Commission, whatever the findings and whatever the facts, may properly require the respondent to cease and desist only from *improper conduct*, and we do not believe the order to cease and desist in this case can be justified, whatever the findings and whatever the facts. If The American Tobacco Co. does not enter into any agreement, express or tacit, with two or more of its jobbers, within or outside an association, it has a right to refuse to sell a jobber who persists in selling its goods at a price lower than the price made by those two jobbers, and this, whether or not the two jobbers have agreed on the price at which they shall sell,—*if*, in its judgment such lower price is so low that, if persisted in, it will injure the business of The American Tobacco Company. And it has this right whatever it may have done in Philadelphia in 1921.

We have difficulty with this record in arriving at the definite theory of the Commission as to the facts that, in its judgment, constitute a basis for the order to cease and desist. Commissioner VAN FLEET in his dissenting opinion states that the charge against The American Tobacco Company is that it "conspired with the Wholesale Dealers' Association to maintain prices" and he concludes that there is no evidence to support that charge. Perhaps he is right, and perhaps the Commission intended to find facts from which are to be deduced, as an ultimate finding, the fact that such a conspiracy existed. We look in vain, though, through the record for any such ultimate and specific finding.

The findings of fact and conclusion of the Commission are in the Record (715-723, fols. 1340 to 1357). Paragraphs one and two thereof (Rec., 717-721, fols. 1344 to 1352) seem devoted to findings against the Wholesale Dealers' Association and the jobber respondents, its members, paragraph four thereof (Rec., 723, fols. 1356, 1357) seems to constitute a general finding that the acts theretofore found had a tendency to induce uniformity of prices and therefore to suppress competition. We are compelled to believe that the findings that are supposed to be findings against The American Tobacco Company are set forth in paragraph three (Rec., 721-723, fols. 1353 to 1356). It is a very difficult undertaking to analyze this paragraph into findings of fact but we have attempted it by paralleling the Commission's findings with a statement of what we understand them to mean when expressed in explicit words instead of redundant and indefinite ones. It seems plain to us, also, that there is no relevant finding (that is one which can form a predicate for the order) that is not entirely unsupported by the testimony and there is no finding which has any support in the testimony which is not entirely irrelevant.

(1) Paragraph Three: During the period aforesaid in which the Association adopted and maintained uniform resale prices for said American Tobacco Company's products in the manner and by the means set out in Paragraph Two hereof, it was the general policy of said American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by co-operation among themselves uniform re-sale

(1) During a given period it was the general policy of The American Tobacco Company (*not, so far as this finding is concerned, applicable to Philadelphia and its vicinity*) to assist groups of its jobbers in the maintenance of prices that these jobbers had fixed by co-operation among themselves, by refusing shipments of its goods to people who did not maintain these prices.

(*This is both irrelevant and unsupported by the*

prices on its products, by refusing shipments of its goods to such of its jobbers who had re-sold or who would re-sell at prices lower than those fixed by such jobbers by co-operation among one another.

(2) Such was the policy of said American Tobacco Company with respect to respondent Association and its Members. The representatives of said American Tobacco Company in the territory in which the Members re-sold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

(3) Said American Tobacco Company knew of the price agreements made by the Association and its Members as described in Paragraph Two hereof

(4) And agreed with the said Association and its Members to help them maintain the price agree-

testimony. It is irrelevant because howsoever broad in territory an order to cease and desist based on proper evidence may be there must be evidence in accordance with the complaint and the complaint is limited to a recital of activities affecting *Philadelphia jobbers.*)

(2) That this policy was carried out by The American Tobacco Company in Philadelphia and its vicinity and that the representatives of The American Tobacco Company in this territory were instructed to carry out such policy.

(This is relevant but is unsupported by the Testimony.)

(3) The American Tobacco Company knew of the price agreements made by members of the Association.

(This is irrelevant and unsupported by the testimony.)

(4) The American Tobacco Company agreed with the Association and its members to help them

ments described in Paragraph Two hereof.

(5) Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the Members, having declined an invitation of the president and treasurer of the respondent Association to join its membership, was urged by the Division Manager of the American Tobacco Company in charge of its Philadelphia territory, to join the Association. Said Division Manager requested said Seider to join the Association and not to sell at prices below those fixed by it and its Members, but to comply with the uniform prices put into effect by the Members and by the Association as described in Paragraph Two hereof.

(6) Said Seider refused to join the Association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the Association and its Members that the said Seider was reselling its products at prices less than those fixed by the Association and its Members,

maintain the price agreement.

(This is relevant but unsupported by the testimony.)

^a (5) Charles Seider, a Philadelphia Jobber, was urged or requested, by the Division manager of The American Tobacco Company in charge of its Philadelphia territory, to join the Association and not to sell products at prices below those fixed by the Association.

(This is entirely irrelevant because The American Tobacco Company, as a company, cannot be held responsible for personal advice given by one of its salesmen. It is also, in fact, unsupported by the testimony.)

(6) Pressure was put on this jobber, Seider, by The American Tobacco Company to force him to join the Association by refusing to sell him goods, and the pressure was successful and he did join the Association and thereafter bought goods from The American Tobacco Company.

discontinued selling to said Seider in the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the Association and its Members to maintain the price agreements as described in Paragraph Two hereof. After said Seider, following the suggestion made to him by the said Division Manager that if he joined respondent Association, it would help him to get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice president of the respondent Association for membership therein, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

(7) Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the Association in April, 1921, because they were accused by said Association of reselling at prices less than those fixed by the Association. The American Tobacco Company, after in-

(This is, perhaps, irrelevant and certainly unsupported by the testimony.)

(7) Murphy Bros., jobbers in and near Philadelphia were refused products of The American Tobacco Company, that penalty being for reselling The American Tobacco Company's products at prices less than those fixed by the Association, and for the purpose of assisting the Association and its members.

investigating complaints made to it by the Association that said Murphy Brothers were reselling its products at prices less than those fixed by the Association and its Members, discontinued selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the Association and its Members in maintaining the prices which had been fixed as set out in Paragraph Two hereof.

(8) For the purpose of assisting the Association and its Members in maintaining the prices fixed by them as set out in Paragraph Two hereof, the American Tobacco Company in 1921, because of complaints made to it by the Association and its Members that respondents Fermani and Blumenthal were re-selling its products at prices less than those fixed by the Association and its Members, withheld shipments of its products to said Fermani and Blumenthal while it was investigating the prices at which Fermani and Blumenthal were re-selling its products.

(This is unsupported by any testimony and contradicted by all.)

(8) For the purpose of assisting the Association in maintaining the price, The American Tobacco Company withheld shipments of its products from Fermani & Blumenthal.

(This is entirely unsupported by even a shred of testimony.)

In this analysis and assumption that the findings directly applicable to The American Tobacco Company are contained in paragraph three of the findings, we are not inadvertent to some generalization in those paragraphs of the findings devoted to the jobbers and their Association, as for instance the finding that the Association and its members "sought and secured the co-operation of The American Tobacco Company" (Rec., 721, fol. 1352) which The American Tobacco Company rendered by circular letters that made certain implications "in veiled language," and again, that the members of the Association reported the names of price-cutters to The American Tobacco Company which report The American Tobacco Company proceeded to investigate, etc. (Rec., 721, fol. 1353). It remains true, however, so far as we can analyze the findings, that the foregoing is a fair statement of them, and that the Commission did not intend to make any distinct findings against The American Tobacco Company other than these.

Finding "T"—General Policy of The American Tobacco Company.

It is obvious from all of the testimony in the record that in the post war deflation of 1920-21 the business of tobacco jobbing had become peculiarly demoralized. The cut price situation had always caused complaint, sometimes justified and sometimes unjustified, but it never has been so serious, nor has seemed so real a menace to the business as in 1920-21. Jobbers complained against competitors whom they thought took an unfair advantage; they complained to the Federal Trade Commission itself; they were frequently making complaints to the manufacturers of tobacco.

The policy of The American Tobacco Company was publicly stated by a circular issued to all of its customers

under date of June 29, 1921 (Com. Ex. No. 10). The third paragraph of that circular is as follows:

"It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable or the business on our brands being profitable taken by itself, is a jobber who in the long run will be a detriment and not a benefit to our business as our customer."

It was expressly stated in the circular that The American Tobacco Company did not mean "price maintenance" but they did say that:

"* * * where a jobber * * * elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer."

This circular was sent in June, 1921, substantially a year after the formation of the Wholesale Tobacco Dealers Association of Philadelphia—therefore it is clear the circular did not induce the formation of that Association. The circular was not found by the Commission to be an illegal pronouncement or to threaten illegal conduct, but it is presumably referred to as "implying the same in veiled language," and the Commission mentions the letter as attempting to maintain (presumably in veiled language) "prices fixed in the aforesaid letter." It is perfectly obvious that no prices were fixed in the letter, and since the language is written, the Court may, as well as the Commission or counsel, determine whether there were veiled threats.

No one can doubt that The American Tobacco Company was acting independently and in its own interest. It is evident, we believe, that The American Tobacco Company is in business primarily for profit to itself. We

submit that it is not reasonable to assume that its officers would conspire with the jobber for the jobber's benefit merely. As between its officers taking lawful action for the company's own protection and taking action of doubtful legality to protect others—we submit the probability is on the side of the former. In Commission's Exhibit 18 (Rec., 221-222, fols. 415-416) it appears that the President of The American Tobacco Company would not cut off a "cut price house * * * *for they reach trade * * **"

The problem that confronted the jobber was not the same problem as the one that confronted the manufacturer. It was created by the same facts but it was not the same problem, nor was the remedy the same. The problem that confronted the jobber was the immediate one of making his bread and butter and keeping out of bankruptcy. The problem of the manufacturer was to maintain a sufficient number of satisfied customers—customers who were making enough money to induce them to keep on with the tobacco business—so that the products of The American Tobacco Company could be distributed rapidly through the jobber to the retailer and placed on the shelves of every retail store or stand in the United States where the consumer could get them.

It is quite clear, we believe, that the respondent had no purpose to discontinue the accounts of jobbers for reasons that seemed good to other jobbers but not to the respondent. It must not be overlooked, though, *that a price cutter who does business on a small margin of profit, or none at all, often becomes a bad business risk.* If a customer's account becomes a bad business risk, his account might be discontinued. If he is sound in most respects, but was over-extended, the holding of his orders until his account is reduced will serve the purposes of The American Tobacco Company's credit department. The attorneys for the Commission have throughout this

proceeding overlooked the fact that The American Tobacco Company sells its goods entirely on credit, and that the mere discontinuance of a customer's account, permanently or temporarily, or holding his orders for a time, does not necessarily indicate anything more than that the credit department has become concerned over the situation. A customer might be cut off for "sales reasons"—the real cause being that by selling at unduly low prices he has increased his volume of sales, but over-extended and thus weakened his credit. This would not mean a lack of generally sound financial standing or business ability. Such was the case with Murphy Brothers. It must not be forgotten that *unreasonably low prices are inextricably interwoven with credit conditions.*

A price war among jobbers might go on for a long time before it affected respondent, but it is quite clear that it affects respondent directly when, one jobber, or two jobbers, by selling at prices that give them little or no profit, begin to acquire in a volume which they cannot satisfactorily handle, the business of many other jobbers. The distribution of our goods is thus seriously interfered with, our outlets are reduced in number and we are deprived, against our will, of customers who are satisfactory to us and render us a service. It is clear that a jobber who tries to establish himself by such methods must be doing it at our expense. Why should we finance a jobber in a price-cutting war when he sells goods at a loss in order to get business away from our other customers and perhaps ruin them and drive them out of business? Why should we continue to ship goods on credit beyond a safe margin to the author of all this trouble?

Another piece of evidence, bearing on the general policy of The American Tobacco Company, was a letter introduced by counsel for the Commission, written on May 2, 1921, by George W. Hill, vice-President of The

American Tobacco Company, to Mr. Harry B. Finch of Minneapolis, Minnesota. In the Spring of 1921 certain correspondence occurred between Mr. Percival S. Hill and Mr. Finch; pending it, Mr. Percival S. Hill went abroad, and in his absence the correspondence was carried on by Mr. George W. Hill. Mr. Finch was a Minneapolis jobber who, so far as we know, never was in Philadelphia in his life. He had never sold goods there, and there is no sort of suggestion that the correspondence was ever communicated to anybody who ever sold goods in Philadelphia. So far as appears, Mr. Finch was a member of no association of any sort, but was a jobber who, like most jobbers in the Fall of 1920 and the Spring or 1921, was greatly disturbed at the very low profits that he was making. The prime importance of this correspondence, in the view of counsel for the Commission, lies in a sentence used by Mr. George W. Hill, in his letter of May 2, 1921, the last letter in the correspondence:

"We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit." (Rec., 682, fols. 1263-64.)

In order to make this testimony at all relevant to this case, there has to be something to connect it with the Philadelphia situation, because there is no charge in this case of any co-operation with Minneapolis jobbers or of inducing or being induced by Minneapolis jobbers to co-operate.

In the employ of The American Tobacco Company at Philadelphia in 1921 was Mr. Thomas F. O'Boyle, who never was an officer of the Company, and who at the time of his examination had actually left its employ. (Rec., 372, fol. 674.) To what extremities counsel for Commis-

sion must have been reduced to have sought to make this letter relevant and competent evidence in this proceeding by exhibiting it, written over the signature of a Vice-President of the Company, to Mr. O'Boyle and then asking him whether this letter stated the policy of the Company that prevailed in Philadelphia. It is to be noted, too, that this letter had other things in it than the sentence quoted—among them that no co-operative measures could be taken by The American Tobacco Company and other large manufacturers of tobacco, and that The American Tobacco Company would like always to have its tobacco distributors make living profits. (See Commission's Exhibit 32.) Mr. O'Boyle, having stated generally that the letter of Mr. Hill stated the policy of the Company in Philadelphia, while still on direct examination, made the following answer to a question of the Commission's counsel:

"There is a part of this letter that isn't in line with any policy, that I understood. First of all, and I will have to tell you what that is before I can go any farther, the part I did not understand is, 'We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested', according to my knowledge of the policy there was no one connected with The American Tobacco Company who suggested that jobbers hold conferences". (Rec., 382, fols. 691-2.)

Besides the irrelevancy of this testimony let us look in all frankness at this Finch correspondence: In the first place, it all preceded the circular of June, 1921 (Commission's Exhibit No. 10), for that was dated and issued June 29, 1921, whereas the last letter of the Finch correspondence was that of Mr. George W. Hill of May 2, 1921. In the second place, one must consider this correspondence as a whole, beginning with the letter (American Tobacco Exhibit No. 1) from Mr. Finch, a

Minneapolis jobber, to Mr. Hill dated April 1, 1921, complaining of the cut price activities of three concerns, two located in Duluth, and one in Grand Falls, Minnesota. This letter was like a great many letters that officers of tobacco manufacturers were receiving, calling attention to the cut price situation, and earnestly asking aid of the manufacturer. Mr. Hill answered that letter, first by the truthful statement that he believed this disposition unduly to cut prices was injurious to his business, and, then he "passes the buck": first by inviting suggestions, and second by a suggestion—old as the hills—that the jobbers had better help themselves. In this letter of Mr. Hill (American Tobacco Exhibit No. 2) there occurs this phrase: "It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other one method." On April 6th Mr. Finch wrote again to Mr. Hill suggesting a concurrent policy on the part of The American Tobacco Company, and Liggett & Meyers Tobacco Company and R. J. Reynolds Tobacco Company, competitors of The American Tobacco Company, not to sell to price cutters (American Tobacco Exhibit No. 3). In the meantime Mr. Hill had gone to Europe, and Exhibit No. 3 was left unanswered. On April 28th Mr. Finch, not having heard from Mr. Hill, wrote to find out why his letter of April 6th had not been answered (American Tobacco Exhibit No. 4). This letter was brought, in the absence of the President, Mr. Percival S. Hill, to the attention of the Vice-President, Mr. George W. Hill, and it was then that the correspondence first came to the attention of Mr. George W. Hill, and then that he wrote the letter of May 2, 1921 (Commission's Exhibit No. 32), of which the Commission's Counsel attempts to make so much. The letter of Mr. George W. Hill states the impossibility of co-operation between The American Tobacco Company and their competitors, and again "passes the buck," recommending the conferences that Mr. Percival S. Hill

had suggested, and those were the conferences referred to in The American Tobacco Company's Exhibit No. 2 already quoted.

In the whole files of The American Tobacco Company this is the only suggestion of conferences among the jobbers. It had no application to Philadelphia, and certainly was not influential there. So far as we know, it was not influential anywhere. It preceded the circular letter of June 29th, and was not a part of any policy there stated. It was a personal letter, written to a jobber who was apparently not a member of any association, and who, so far as appears, never acted upon it. The letter of Mr. George W. Hill did use the word "co-operating". If competition necessarily means hostility, then "co-operating" is an unfortunate word; but "co-operation" was found in *Frey v. Cudahy*, 256 U. S. 208, without unlawful agreement. Mr. Percival S. Hill has given a very frank explanation of his thought concerning conferences. In his testimony with respect to this Finch letter, he says:

"Q. How did you assume that conference among jobbers themselves would do more to correct an evil of this kind than any other one method? A. Well, I think I have stated that the prices and discounts in the selling of our merchandise varied in the different sections of the country on account of the expense involved in the distribution. Now, what those discounts shall be are usually adjusted, always from my experience, always adjusted by what you might call natural competition. Well, that is not by agreement, that is by the necessities of the case, and becomes, as a matter of course, unless those conditions are upset by what you might call unnatural competition, that is, false statements that are made either by one jobber to another or by the salesmen of one jobber about another salesman, and it has been my experience that a frank discussion as to the conditions of a business in a community eliminates

those rabid actions that are brought about by anger or jealousy, or something of that kind, and that if jobbers will get together and discuss their business, those unnatural methods of competition will be eliminated.

Q. Did you intend to suggest to Mr. Finch in this letter an agreement among jobbers fixing prices? A. Certainly not" (Rec., 421, fol. 763).

The foregoing testimony was on the examination of Mr. Hill by counsel on behalf of The American Tobacco Company, but his testimony in response to questions of the Commission's counsel casts no doubt on his sincerity and truthfulness:

"Q. Do you remember testifying on your cross examination, an observation of the advantages that jobbers might obtain by conferring with one another? A. I don't know as I put it just that way.

Q. Well, probably, you are correct you didn't put it that way—? A. Did I?

Q. Don't you remember suggesting that there was?— A. I remember suggesting that there was a real advantage in people talking things over.

Q. And I think you mentioned that one of the causes, among others, of dissatisfaction in the jobbing trade, was due to the fact, if my recollection is good, that a salesman of one jobber would say something about his employer's competitor, and that if the jobbers got together once in a while, those evils could be corrected; do you remember stating something to that effect on your cross examination? A. That is practically correct, yes.

Q. Now, are there any other advantages which jobbers might secure to themselves by getting together and conferring? A. I don't know what you mean by that. I cannot imagine people getting on good terms with one another but what there are a great many advantages that arise from it.

Q. You know one of them is the possibility of an agreed price, isn't there? A. Oh, well, that is your statement, it is not borne out by the facts.

Q. I say, that is a possibility? A. I don't know whether it is or not. I don't think you can get a body of jobbers that would agree to a price situation and maintain it, to save their souls.

Q. Do you think you could get them together to agree upon one? A. I don't know about that, I never tried" (Rec., 437, fols. 792, 793).

Finding "2"—Policy of The American Tobacco Company in Philadelphia and vicinity, and instructions to its sales representatives.

As already pointed out, the sales representatives of The American Tobacco Company in the Philadelphia territory repudiated any suggestion that any conferences among jobbers had been suggested by him. There is not a shred of evidence that any representative of The American Tobacco Company ever attended a meeting of the Philadelphia Association, formal or informal, or any conferences of jobbers.

Undoubtedly jobbers in Philadelphia, members of the Association and those not members, visited the offices of The American Tobacco Company. Some of these jobbers were on the stand and not one stated that he was advised or urged to join the Association. The testimony of Mr. Hill, the President of The American Tobacco Company, is as clear and definite as anything can be. He says, with reference to visits from the Philadelphia jobbers, as follows:

"Q. Mr. Hill, you have said in answer to the direct examination of Mr. Smith, that Mr. Eberbach undoubtedly visited you in 1921, and that you had no reason to deny that Mr. Krull visited you. Did you say to either of these gentlemen or both

together that The American Tobacco Company would support or co-operate with, or further the activities of, their Association? A. No, sir.

Q. In any way? A. Not at all.

Q. How do you know you never said that to them? A. I never said that to anybody; I could not have said it to them; it is not because I remember the conversation; I just know it did not happen.

Q. Because you never said it to any jobber? A. Yes" (Rec., 429, fols. 777, 778).

"Q. Now, Mr. Hill, did you in an interview in your office in 1921, 1920, or at any other time, advise or urge any member of the firm of Murphy Bros. to join any association of tobacco jobbers? A. I certainly did not.

Q. Did you advise him in words such as 'go along with the Association', or any other words indicating your desire that he should join or co-operate with the Association? A. No, sir.

Q. Why are you so positive in that statement? A. Because I never advised anybody to that effect. I always said we had nothing to do with them" (Rec. 423, fol. 766).

It will not be suggested that Mr. Eberbach or Mr. Krull contradicted this testimony of Mr. Hill's and certainly Mr. Murphy did not. He says, on his examination:

"Q. You saw Mr. Hill, President of The American Tobacco Company, in 1921? A. I presume I did; I was over there" (Rec. 260, fol. 480).

"Q. Did you tell Mr. Hill you were a member of the Association? A. I can't recall that" (Rec., 260, fol. 481).

"Q. Did Mr. Hill ask you anything about the Association? A. No, I think I told Mr. Hill about the Association.

Q. Did Mr. Hill . . . say . . . that you should go along with the Association? A. . . . I can't recall that, Counsel" (Rec., 261, fol. 482).

Mr. George W. Hill testified:

"Q. During the years 1920-1921, or at any other time, did you decline to sell any of your theretofore existing customers or decline to put on any applying new customers in and around Philadelphia or elsewhere, because of the request of any jobber or group of jobbers? A. We did not.

Q. Meaning The American Tobacco Company?

A. Meaning The American Tobacco Company did not." (Rec. 475, fol. 865.)

Finding "3"—The American Tobacco Company's Knowledge of Price Agreements.

This finding is to an extent true, but entirely irrelevant.

So far as the officers of the company are concerned, they knew of the existence of the Association of jobbers in Philadelphia, or at least Mr. Percival S. Hill, the President, did. He testified as follows:

"Q. Did you learn in 1921 that there were different organizations of jobbers being organized, or then organized, throughout the country? A. Yes, I heard that.

Q. Did you hear about the Milwaukee association? A. Well, I know I must have; I don't just recall the Milwaukee association.

Q. And the Cincinnati association? A. The same answer would apply.

Q. And the Philadelphia association? A. Yes, the same thing; I heard of it.

Q. . . . Did you hear that a majority of the jobbers serving the Philadelphia trade were allowing, at one time in 1920 and part of 1921, 8 per cent. off list price to their trade? A. I had heard that, yes.

Q. Where did you get that information, Mr. Hill? A. From our salesmen (Rec., 414, fol. 750).

Q. Now did you ever hear, or did you know, that the rate of discount from list price in Philadelphia changed from eight to seven? A. I heard that.

Q. And did you consider that price, that is net price, that 7 per cent. off list price, the prevailing and customary price for Philadelphia? A. I am not sure that I ever did, because I don't believe that—I don't remember. I don't remember whether that discount ever became effective or not; I mean, I don't know whether the majority of jobbers got those prices or not" (Rec., 415, fol. 751).

That is the kind of information that the officers of The American Tobacco Company had of the existence of an association and of its activities. There is not the slightest evidence that they knew when it was formed, how it was formed, what resolutions were passed, or who its officers were, and they did not even know when the jobbers changed their minimum price, if at all, from an 8 per cent. discount or a minimum margin to cover overhead and profit of 4 per cent., to a 7 per cent. discount, which gave a minimum margin of 5 per cent.

In this matter of knowledge, and lest a wrong impression shall be left with the Court, we will here discuss a bit of testimony that is unimportant save only as something on which suspicion might be hung. It appears that The American Cigar Company, engaged in the manufacture of cigars, is owned as to a majority of its stock by The American Tobacco Company, and it appears that until December 1921, American Cigar Company owned some stock in Dusel, Goodloe & Co., cigar jobbers (not engaged in the business of selling cigarettes or tobacco at all). It is to be remembered that the trade warfare in and around Philadelphia, and the activities of the association, had to do with tobacco and cigarette brands and not with cigar brands. It may be suggested that the membership of Dusel, Goodloe & Co. in this associa-

tion brought some knowledge of its affairs in a round-about way to The American Tobacco Company. There is not a word of testimony to justify any such inference and that such a result followed is definitely contradicted by the testimony of the President and Vice-President of The American Tobacco Company. Further, it appears that the jobbers' association, at ~~some~~ stage in the association's activities, entirely unknown to any officer of The American Tobacco Company, employed a man as an investigator and that that man, a Mr. Kane, had at one time been in the employ of Dusel, Goodloe & Co. It is definitely settled by Mr. Kane's own testimony that although he had been in the employ of Dusel, Goodloe & Co. he did not go from that company into the employ of the association but there intervened a period of six months after he had left Dusel, Goodloe & Co. before he thought of going with the association. (Rec., 65, 66, fol. 137). There is no suggestion of testimony that officers of The American Tobacco Company ever knew who this investigator was, or that there was an investigator at all.

Finding "4"—Agreeing with the Association to maintain prices.

There is nothing further to be said on this point. There is not a syllable of evidence to substantiate such a finding and evidence already set out in detail definitely and unequivocally contradicts it.

Finding "5"—Charles Seider urged to join the jobbers Association by a sales representative of The American Tobacco Company.

We have said, and repeat, that this is an irrelevant finding. It signifies nothing that a salesman, with no authority to commit the company in his personal rela-

tions with the jobbers in his territory, which are necessarily intimate and familiar, expresses one opinion or another as to what is wise for the jobber to do. Mr. O'Boyle, the salesman at Philadelphia, certainly had no authority to advise any jobber to join any association. Mr. Hill, President of The American Tobacco Company, testifies as follows, and is wholly uncontradicted.

"Q. Was anyone in the organization of The American Tobacco Company in 1920 or 1921, in Philadelphia or any other place, authorized to urge jobbers to join any association? A. No, sir.

Q. Were they authorized to advise that they join any association? A. No, sir.

Q. Were any of such representatives at any time authorized to represent to any jobbers that unless they followed the line or worked in with, or joined, any association, they would be liable to have trouble in getting goods? A. No, sir; not at all. We never recommended an association any place; we confined our transactions with our customers to them as individuals, and positively declined to recommend an association for any purpose" (Rec., 424, 425, fol. 769).

Moreover, though, Mr. O'Boyle, himself, is explicit in his denial of ever giving such advice to Mr. Seider:

"Q. Did you ever advise the Seiders to join the association? A. I never advised anyone to join the association" (Rec., 390, fol. 705).

The only testimony against this explicit statement concerns casual conversations between Mr. Seider and Mr. O'Boyle set forth by Mr. Seider as follows:

"Q. And Mr. O'Boyle the first time never said anything to you about joining the association at all, did he? A. No, sir.

Q. Didn't suggest that you should join it? A. No, sir" (Rec., 332, fol. 607).

"Q. Now the occasion of the next conversation with Mr. O'Boyle was about when, Mr. Seider? A. It followed after April 30th. * * *

Q. You say that at that time Mr. O'Boyle advised you to go along with the association? A. Yes, sir.

Q. Did Mr. O'Boyle say anything to you about the prices at which you were selling your products? A. No." (Rec., 332-3, fol. 607).

"Q. Then he did not suggest to you why you should join or should not join; is that true? A. He made no direct assertion that we should join—just made it as a suggestion, I took it." (Rec. 333, fol. 609).

How trivial all this is when, according to all the testimony Mr. Seider never joined the association and we would be justified in saying, for reasons to be stated later, was never invited to join, and never considered membership. Mr. Seider himself testifies:

"Q. Did you know that there was an association of tobacco jobbers in Philadelphia? A. I heard so.

Q. Were you a member of it? A. No, sir" (Rec., 296, fol. 544).

Finding "6"—Pressure put upon Seider by The American Tobacco Company that forced him to join or apply for membership in the Association.

The fact is, as just hereinabove stated, that Seider did not join the Association.

It is a fact, however, that The American Tobacco Company for about two months refrained from filling orders for Seider for perfectly valid reasons which had nothing to do with his membership or non-membership in the association. Mr. Seider testified:

"Q. Did you have any difficulty in getting your goods from The American Tobacco Company after that time? A. Yes, a little later on.

Q. When? A. I haven't got the exact date.

Q. What happened with respect to the shipment of your . . . orders given to The American Tobacco Company, two months later? A. What happened?

Q. Yes. A. I simply didn't get them. Didn't receive any goods.

Q. How long a period was it that your orders were not filled by The American Tobacco Company? A. About two months" (Rec., 299, fol. 550).

It so happened that Seider had difficulty for six months in getting goods from P. Lorillard Company—and yet the Federal Trade Commission has dismissed this complaint as to the P. Lorillard Company. Mr. Seider testified in that regard:

"Q. Did you ever have any difficulty in having your orders accepted by the Lorillard Tobacco Company? A. Yes, sir.

Q. When? A. I can't say the exact date. It was started possibly in March or April.

Q. 1921? A. Yes.

Q. How long did that continue? A. About—nearly six months" (Rec., 299-300, fol. 551).

Still referring to Mr. Seider's testimony for our evidence, what do we find as to his beginning to get goods from The American Tobacco Company? It is to be remembered that he was still not a member of the association and still selling The American Tobacco Company's goods at ten and one per cent. off the list, thus leaving him the ridiculously low net profit of one per cent., which certainly would not pay his expenses (see Mr. Seider's

testimony, Rec., 331, fol. 605); Mr. Seider further testified:

"Q. So that after July 12, 1921, The American Tobacco Company sent goods to you no matter what your price was? A. Yes, sir.

Q. And you never made any promise as to what price you were to sell your goods? A. No.

Q. Neither did The American Tobacco Company ever exact from you any promise or agreement as to what prices you would sell your goods? A. No.

Q. And never gave you any orders about selling your goods at any particular price? A. No.

Q. That is true? A. Yes" (Rec. 331-2, fols. 605, 606).

Now what are the further facts with regard to Mr. Seider as developed by this testimony? He was primarily a cigar manufacturer who sold his own cigars at retail. He also did a small jobbing business. Suddenly (and obviously, because most Philadelphia jobbers were attempting to make a legitimate profit) his purchases and sales increased twelve-fold. He was buying from The American Tobacco Company at ten per cent. off the list, trade discount, plus two per cent. off the list for cash, and selling at ten off—a price at which he could not make a living and which was of course induced only by his desire to place more of his own cigars. Why should he use his cigar business to finance a trade war against the regular jobbing customers of The American Tobacco Company? Why should he be permitted to jeopardize, financially, his account by suddenly increasing his purchases only to sell goods at a loss? This testimony is not the testimony only of The American Tobacco Company officers, but Mr. Seider himself admits it.

"Q. Isn't it the fact that in the first four months of 1921 you ordered from the Lorillard Tobacco Company as many goods as you ordered

during the entire four preceding years? A. Possibly; I can't say exactly.

Q. That is about right according to your best recollection? A. Yes" (Rec., 307, fol. 562).

"Q. Can you tell us what the general run (of your prices) was? A. We were selling from five per cent. up to ten per cent.

Q. That means ten per cent. off, does it not? A. Yes.

Q. Wasn't the bulk of it ten per cent. off? A. The bulk?

Q. Wasn't the bulk of the sales ten per cent. off during the first four months of 1921? * * *

A. Well, possibly.

Q. That is about right, isn't it? A. Pretty near right" (Rec., 307-8, fol. 563).

"Q. You are a cigar manufacturer? A. Yes.

Q. What help do you have in the manufacture of cigars? A. Why, twenty-five hands down to five hands (Rec., 309, fol. 566).

Q. What else do you sell besides cigars? A. Tobaccos, cigarettes, pipes, smokers mixtures in general.

Q. How does your cigarette business compare with your cigar business? A. I pay more attention to the cigar business? * * *

Q. That is your principal business, pushing your cigar business? A. Yes, sir" (Rec., 309-10, fols. 566, 567).

Mr. Seider testified that the same facts applied to the sale of The American Tobacco Company's brands as to P. Lorillard Company's (Rec. 308-9, fols. 564-565).

Finding "7"—Conduct of the American Tobacco Company in refusing to sell its products to Murphy Bros.

Explicit testimony has already been quoted that no officer of The American Tobacco Company had urged

or advised Murphy Bros. to join the Association. The fact is, as appears by this testimony, although utterly unknown to the officers of The American Tobacco Company, that Murphy Bros. were members of the Association and that they and other members of the Association engaged in criminations and recriminations with respect to price-cutting. Why did The American Tobacco Company, from time to time, refuse to sell Murphy Bros. its products? The testimony of Mr. Hill is definite:

"Q. Why were they (Murphy Bros.) cut off when they were cut off? A. They were cut off for credit reasons" (Rec., 424, fol. 767).

As against this explicit testimony of Mr. Hill there is, among the exhibits, the office memorandum of The American Tobacco Company that is taken to indicate that Murphy Bros. were cut off from the direct buying list for sales reasons. The fact is, of course, that the credit and selling reasons are frequently closely intertwined and that the fact that Murphy Bros.' selling prices were so low as to make impossible any profit reacted necessarily on their credit condition. Mr. Hill's testimony is an entirely frank discussion of it, in every way corroborated by Mr. Murphy. Mr. Hill testifies:

"Q. What was the average condition of their account during 1921 (referring to Murphy Bros.)?
 * * * A. Well, they owed us at various times during 1921—oh, anywhere from eighteen to thirty-five thousand dollars.

Q. Did you have interviews with members of the firm, one or both, as to the condition of their account? A. Yes, sir; several.

Q. Did you hear during 1921 that they were selling goods at a very low price? A. Yes, I heard that they were selling goods less 10 and 15% and we allowed them 10 and 2.

Q. That gave them a gross profit of— A. One per cent.

Q. Is your familiarity with the tobacco business sufficient to enable you to give an opinion as to whether that enables one to pay his expenses?
A. It can't be done.

Q. In your discussions with one of those members of the firm of Murphy Bros., your discussions during 1920 and 1921, did you refer to that low price they were making, * * * A. Yes, sir.

Q. Where did you get your information that they were making that low price? A. I got it from our salesmen.

Q. How did you discuss that low price they were making with respect to their credit condition, or were the two discussed together? A. They were practically discussed together, that they owed us so much money; they were not paying their bills promptly, and how could they expect to continue in business at a profit, selling their goods on a one per cent. margin.

Q. And according to your recollection during the period of 1919, 1920 and 1921, they were, for those reasons, off the list two or three times? A. Yes, sir" (Rec., 424, fols. 767-9).

Mr. Murphy in no way contradicts a word of this testimony and his testimony, so far as it goes at all, is in corroboration.

"Q. Can you tell us within \$5,000 the amount of your indebtedness to The American Tobacco Company on open account? A. I might say about \$15,000" (Rec. 265, fol. 489).

Incidentally Mr. James Murphy did not know that Murphy Brothers had been "dropped from the list of The American Tobacco Company" (Rec. 264, fol. 487). He carried "a pretty good stock" (Rec. 264, fol. 487).

While the Commission's finding indicates The American Tobacco Company discontinued selling Murphy Brothers for about five weeks they have overlooked the fact testified to by James Murphy that exactly in the middle of that period a shipment ordered two and one-half weeks before was received (Rec. 228, fol. 429).

Finding "8"—Conduct of The American Tobacco Company towards Fermani and Blumenthal.

This finding, better than anything else in this record, demonstrates the infinitesimal littleness of testimony that seems to satisfy the Commission and induces it to make solemn findings against respondent. The finding is that, for the purpose of assisting the Association in maintaining prices, and because of complaints made to it by the Association and its members that these two jobbers (Fermani and Blumenthal) were reselling products of The American Tobacco Company at prices less than those fixed by the Association, The American Tobacco Company withheld shipments from them. No officer of the American Tobacco Company ever admitted having any complaints from the Association or any of its members as to the conduct of Fermani or Blumenthal. No member of the Association testified to ever making such complaints. Mr. Fermani was on the stand as a witness for the Commission and he gave no testimony as to any threats or the withholding of his orders. Mr. Blumenthal was not called as a witness by anybody. The sole testimony that we are able to find in this record bearing on the question at all is the following from the testimony of Mr. O'Boyle, a salesman who was employed in Philadelphia during 1921:

"Q. Were there any jobbing firms in Philadelphia outside of Seider Brothers and Murphy Brothers who were cut off, whose shipments were held up by The American Tobacco Company during the period that you were field sales manager for The American Tobacco Company in Philadelphia? A. Yes.

Q. What were those firms, what were the names of those firms? A. One was Fermani, the other was Blumenthal.

Q. Anyone else? A. I think that is all.

Q. Gordesky? A. No.

Q. Did you ever investigate or have anyone under you investigate the prices at which Fermani was selling or the discounts he was allowing?

A. No, sir.

Q. What do you say as to Blumenthal? A. No, sir.

Q. From whom did you get your information that Fermani's shipments were being held up by The American Tobacco Company? A. From Mr. Fermani.

Q. And from whom did you get the information that Blumenthal's shipments were being held up? A. I think it was Mr. Blumenthal.

Q. Did you get that information as to Fermani from anybody other than Fermani? A. I do not remember.

Q. What did you do when you were told by Fermani that his shipments were being held up? Did you take it up with your company? A. I think I did, yes, sir.

Q. When Fermani told you shipments were being held up, did he tell you why they were being held up? A. I do not think he did.

Q. What information did you get from the American Tobacco Company when you reported that Fermani had told you that his shipments were being held up? A. I think I was instructed not to bother very much about it.

Q. Who gave you those instructions? A. I do not remember any individual.

Q. Was it somebody connected officially or in an executive capacity with The American Tobacco Company? A. I think it was, yes.

Q. What was said to you by your superiors when you reported that Blumenthal said that his shipments were being held? A. I think his shipments came forward immediately.

Q. When you reported to the Company that Blumenthal had told you that his shipments were being held up, what did The American Tobacco Company tell you, if anything? A. I think they said that the shipments would go forward at once" (Rec., 386-7, fols. 697-8).

We have said this is the only testimony, and that is true. Mr. Hill on his examination by counsel for the Commission was asked:

"Q. What did you say was the reason, or did you give a reason, for the withholding of shipments to Fermani of Philadelphia? A. I did not give you the reason, and I cannot tell you now what it was" (Rec., 435, fol. 788).

"Q. Do you recall with respect to either of these last mentioned, Charles Seider or B. Fermani, whether you heard of their increased business or their selling goods at what you deemed very low cost? A. No, sir; I don't remember that" (Rec., 426, fol. 772).

Further comment is unnecessary.

The Commission's Dismissal of Its Complaint Against P. Lorillard Company.

The complaint in this case was originally filed against the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia and certain persons connected with it, charging them as officers, directors and members, The American Tobacco Company and P. Lorillard Company. The charges against The American Tobacco Company and P. Lorillard Company are the same, and are included in the same paragraph of the complaint (Rec., 6) where these companies are referred to as the "Respondent Manufacturers". Both answered. Testimony was taken with respect to each, and the Trial Examiner's findings included both (Rec., 757, 760-4). Much more space is devoted to the activities of P. Lorillard Company than to those of The American Tobacco Company. Its circular letters are set out in full (Rec., 760-2, Paragraph Six; Rec., 762, Paragraph Seven; Rec., 764).

The Seider incident, which has been referred to with respect to The American Tobacco Company was duplicated with P. Lorillard Company, but The American Tobacco Company is found to have refused Seider any of its products from April 30th to July 12th, 1921 while the Lorillard Company refused to furnish him goods from April 5th to November 1, 1921 (Rec., 763). With respect to the Lorillard Company, the Examiner, referring to Seider, states, "In the meantime this old customer of Lorillard Company was pleading to have his orders filled" (Rec., 763). However, the Commission, for some reason not apparent to us, dismissed its complaint against P. Lorillard Company (Rec., 715), making no findings of fact with respect to it although making findings against The American Tobacco Company and entering an order to cease and desist against it. This discrimination, without apparent reason, was vigorously commented upon by Commissioner Van Fleet in his dissent (Rec. 726) where he said,

"The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture, there is not proof to warrant an order against the American Company."

This action is mentioned by the Circuit Court of Appeals (Rec., 790), the actions of the Lorillard Company are commented on (Rec., 792) and the dissent of Commissioner Van Fleet is quoted by the Court with approval (Rec., 804).

It is evident that in dismissing its complaint against the Lorillard Company, the Commission decided that its methods of competition were not unfair, and as there is no distinction apparent to us between the methods of the Lorillard Company and The American Tobacco Company, it seems clear to a demonstration that if the

methods of the Lorillard Company were not unfair, the methods of The American Tobacco Company also were not unfair. Therefore, on a question of fact, the Circuit Court of Appeals, one Commissioner expressly, and three by implication, have held that the methods of The American Tobacco Company, as disclosed by this record, are fair methods of competition and not in violation of the Federal Trade Commission Act. It would seem that, under such circumstances, this Court would be disinclined to investigate a record of over 800 pages to arrive at a different conclusion on a question of fact.

had to be bought and paid for separately from the wheat, or separated and returned to the seller. A license was necessary to operate an elevator, for which a charge was made according to the capacity of the elevator. Every elevator operator "buying or shipping for profit" who did not pay cash in advance was required to give a bond. A buyer was required to keep a record of wheat bought and to show therein the price paid and the grades given, and "the price received and the grades received at the terminal market," which information was made available to the supervisor. Again we find an act directly regulating and burdening interstate commerce.

Respectfully submitted,

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Has transcript of Record been filed? ✓

SUPREME COURT OF THE UNITED STATES.

No. 279.—OCTOBER TERM, 1926.

Federal Trade Commission, Petitioner,	}	On Writ of Certiorari to
<i>vs.</i>		the United States Circuit
American Tobacco Company.		Court of Appeals for the Second Circuit.

[May 31, 1927.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ.

Proper decision of the controversy depends upon a question of fact. Did the American Tobacco Company become party to the unlawful combination of tobacco jobbers at Philadelphia to maintain prices? After considering much evidence the Commission gave affirmative answer to that query; but the Circuit Court of Appeals thought there was nothing to support their view. 9 Fed. (2d) 570.

It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below.

The opinion of the Circuit Court of Appeals is of uncertain intentment and is not satisfactory as an exposition of the law. What this Court has said in many opinions indicates clearly enough the general purpose of the statute and the necessity of applying it with strict regard thereto.

Affirmed.